RECORD AND BRIEFS

No. 15-1500

In the Supreme Court of the United States

BRIAN LEWIS, ET AL., PETITIONERS

v.

WILLIAM CLARKE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

REPLY BRIEF FOR THE PETITIONERS

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Because individual-capacity actions operate only against individual government employees, not against the sovereign, they do not implicate sovereign immunity. This Court has repeatedly applied that principle, and applying it here resolves this case.

To the extent Clarke addresses the question presented, he does not try to defend the contrary reasoning of the Connecticut Supreme Court. Instead, he argues that the action in this case—which seeks relief only against him personally—is somehow really against his employer, the Mohegan Tribal Gaming Authority, because the Mohegan Tribe has agreed to indemnify the MTGA's employees. But the application

of sovereign immunity depends on which party will be bound by a judgment, not on who might ultimately bear the economic loss. Many States indemnify their employees, but this Court has never suggested that individual-capacity actions in those States implicate sovereign immunity.

Clarke devotes most of his brief to a different issue: he urges this Court to create a rule of tribal official immunity that is even broader than the common-law immunity of federal employees. That argument is not within the scope of the question presented, which refers only to sovereign immunity, and it was neither raised nor considered below. If the Court nevertheless addresses the argument, it should decline Clarke's invitation to create a new doctrine of tribal official immunity. Federal official immunity rests on the Supremacy Clause and on the principle that the operations of the federal government must be governed by federal law. A rule of tribal official immunity, by contrast, would have no constitutional or statutory basis. And the nature of this case—a tort claim arising from off-reservation commercial activity—illustrates how unjustified such a rule would be. This Court has never held that a tribe's sovereign immunity applies in the context of off-reservation torts. Yet Clarke asks the Court to hold that the tribal employees who commit such torts should enjoy an absolute immunity from individual liability. If such an extraordinary expansion of immunity is desirable, it must come from Congress.

The Court should resolve the question presented by reversing the decision below and holding that the sovereign immunity of an Indian tribe, like the sovereign immunity of the United States or of a State, does not

prevent individual employees from being held accountable for their misconduct.

A. Sovereign immunity does not bar individual-capacity damages actions, even if a government has agreed to indemnify its employees

This Court has held that sovereign immunity "does not erect a barrier against suits to impose 'individual and personal liability'" on government officials, even if that liability is based on acts they performed in the course of their official duties. *Hafer* v. *Melo*, 502 U.S. 21, 30-31 (1991) (quoting *Scheuer* v. *Rhodes*, 416 U.S. 232, 238 (1974)). As explained in the opening brief (at 7-12), that principle answers the question presented here. Because an individual-capacity damages action seeks relief only from an individual employee, not from the sovereign, sovereign immunity does not bar such an action.

Clarke does not defend the contrary reasoning of the Connecticut Supreme Court. Instead, he relies entirely on a theory discussed nowhere in the decision below. In his view, (Br. 15) the Tribe's decision to indemnify the MTGA's employees means that the Tribe "is the real party in interest" in this case. That is so, he maintains, even though the complaint seeks no relief from the Tribe, and even though any judgment could be "executed only against [Clarke's] personal assets," not against the Tribe. *Kentucky* v. *Graham*, 473 U.S. 159, 166 (1985). That argument lacks merit.

1. Clarke first observes (Br. 16) that "the sovereign is the real party in interest if it must pay any adverse judgment." That is correct, and it is dispositive

here because a judgment against Clarke will not bind the Tribe. The Lewises seek a judgment against Clarke personally, and a judgment in their favor will bind only him. If the Tribe has any obligation to pay a judgment against Clarke, that obligation derives from the Tribe's voluntary decision to indemnify the MTGA's employees, not from the judgment itself. See *Demery* v. *Kupperman*, 735 F.2d 1139, 1148 (9th Cir. 1984) ("When * * * the state's obligation to pay damages derives not from the nature of plaintiff's claim, but from an entirely collateral, voluntary undertaking on the part of the state, the federal court is in no way exerting power over the state or the state's treasury."), cert. denied, 469 U.S. 1127 (1985).

According to Clarke (Br. 16), courts apply a "functional" test under which it does not matter whether "a judgment will be formally executed against the sovereign's treasury." He argues that *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), "explained that sovereign immunity attaches if a judgment against the sovereign's agent might 'require action by the sovereign *or disturb* the sovereign's property,'" and he reasons that immunity attaches whenever "a sovereign might be liable 'in effect.'" Br. 16 (quoting *Larson*, 337 U.S. at 687) (emphasis added by Clarke). In fact, the Court in *Larson* held that "the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign," and it explained that "[i]n a suit against the officer to recover damages" from the officer, sovereign immunity does not apply. 337 U.S. at 687. In the other decisions Clarke cites, this Court concluded that the judgment itself would directly bind the sover-

eign. See, *e.g.*, *Edelman* v. *Jordan*, 415 U.S. 651, 655-656 (1974) (plaintiffs sought injunction requiring state officials to pay disability benefits from the state treasury); *Malone* v. *Bowdoin*, 369 U.S. 643, 643-644 (1962) (plaintiffs brought action against Forest Service official to establish that they, not the United States, owned a parcel of land); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945) (plaintiff brought action for tax refund and "did not assert any claim to a personal judgment" against defendants).

Clarke attempts (Br. 17-20) to analogize himself to a state instrumentality, noting that a State's financial responsibility for judgments against a state-created agency is one factor in assessing whether that agency shares the State's Eleventh Amendment immunity. But Clarke—an individual hired to drive a limousine—is unlike an instrumentality because he is a natural person, not a creation of tribal law. Significantly, Clarke identifies no cases in which this Court—or any other court—has applied the principles governing state agencies to determine whether sovereign immunity bars an action against a government employee.

More generally, Clarke cites no case in which a court extended sovereign immunity to an action against a government employee simply because the government had indemnified the employee. As noted in the opening brief (at 19), many States indemnify employees who are subject to individual liability because of the performance of their official duties. Yet no courts have applied Clarke's reasoning to conclude that suits against employees of those States implicate the Eleventh Amendment, and as Clarke concedes (Br. 23), many courts have held the exact opposite.

Clarke argues that those cases involved violations of federal law and that, under *Ex parte Young*, 209 U.S. 123, 160 (1908), an official who violates federal law is "stripped of his official or representative character." But this Court has held that the *Young* theory is limited to prospective relief and does not authorize an award of damages against a State. *Edelman*, 415 U.S. at 666-668. Thus, if Clarke were correct that damages actions against indemnified employees are "really * * * against the sovereign" (Br. 19), *Young* would provide no basis for such actions. The reason such actions are permissible is not that *Young* creates an exception to sovereign immunity; it is that a sovereign's decision to indemnify an employee does not convert an individual-capacity action into one that implicates sovereign immunity.

2. Clarke's theory is also inconsistent with the treatment of indemnification in other contexts. In assessing the existence of diversity jurisdiction, for example, courts consider only the citizenship of the real parties to the controversy. *Navarro Sav. Ass'n* v. *Lee*, 446 U.S. 458, 460-461 (1980). But courts have repeatedly held that the real party is the party against whom relief is sought, not another entity that may have agreed to indemnify the defendant. See, *e.g.*, *Corfield* v. *Dallas Glen Hills LP*, 355 F.3d 853, 865 (5th Cir. 2003), cert. denied, 541 U.S. 1073 (2004); *E.R. Squibb & Sons, Inc.* v. *Accident & Cas. Ins. Co.*, 160 F.3d 925, 936 (2d Cir. 1998); cf. *Missouri, Kan. & Tex. Ry. Co.* v. *Hickman*, 183 U.S. 53, 61 (1901). Likewise, an entity that has agreed to indemnify the defendant is not a necessary party whose joinder is required by Federal Rule of Civil Procedure 19. See, *e.g.*, *Gardiner* v. *Vir-*

gin Islands Water & Power Auth., 145 F.3d 635, 641 (3d Cir. 1998); *Rochester Methodist Hosp.* v. *Travelers Ins. Co.*, 728 F.2d 1006, 1016-1017 (8th Cir. 1984). There is no general principle that an entity may be treated as a "real party in interest" merely because it has agreed to indemnify the defendant.

3. Finally, Clarke says (Br. 24) that "indemnification is not truly 'voluntary' for many Tribes, as it is for States," because (Br. 26) tribes may find it necessary to engage in "external commercial activities." Even if that were true, it would not change the reality that an action against a tribal employee is not the same as an action against the tribe itself. In any event, Clarke is wrong to suggest that indemnifying employees is a prerequisite for engaging in commercial activity, and he provides no evidence for his assertion (Br. 25) that, without indemnification, the Tribe "might be forced to forgo the full complement of services incident to self-governance." That assertion is particularly odd in the context of this case, where the "service[]" at issue is driving patrons to and from a casino. In the market for professional drivers, the Tribe's primary competitors are not state governments but other commercial businesses—such as taxi companies, bus lines, and delivery services—that do not enjoy sovereign immunity. The Tribe does not need a special rule of immunity in order to compete with them.

B. Clarke's official-immunity theory is not properly before the Court and lacks merit in any event

Apparently recognizing the weakness of his argument for extending sovereign immunity to individual-capacity damages actions against tribal employees,

Clarke devotes the bulk of his brief to a different issue. He argues (Br. 26-49) that this Court should recognize an "official immunity" that bars actions against tribal employees. He further contends that tribal official immunity should be even broader than the official immunity applicable to federal employees under *Westfall* v. *Erwin*, 484 U.S. 292 (1988), in that it should confer absolute protection against litigation, regardless of whether the challenged conduct involved the exercise of policymaking discretion. Those arguments are not within the question presented and have been forfeited because Clarke failed to raise them below. If the Court does consider them, it should reject Clarke's invitation to create a novel rule of tribal official immunity, particularly one that is even broader than the common-law immunity of federal officials.

1. **Official immunity is not within the question presented and was neither raised nor considered below**

This Court should decline to consider Clarke's official-immunity arguments for two reasons.

First, official immunity is not within the scope of the question presented, which asks "[w]hether the *sovereign immunity* of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment." Pet. i (emphasis added). Clarke attempts (Br. 11) to conflate sovereign immunity and official immunity, describing them as "interrelated." But although they both include the word "immunity," they are distinct doctrines with different origins, and this Court has treated them separately. See, *e.g.*, *Samantar* v.

Yousuf, 560 U.S. 305, 322-323 (2010); *Scheuer*, 416 U.S. at 239-240; *Larson*, 337 U.S. at 687 n.7. Clarke notes (Br. 28) that the petition discussed official immunity in order to explain that "[t]he Connecticut Supreme Court's error was not simply a matter of attaching the wrong label to the immunity that it extended to respondent." Pet. 19. It is common for a petition for a writ of certiorari to point out the absence of an alternative basis for affirming the decision below and to explain that the resolution of the question presented will be outcome-determinative. See Stephen M. Shapiro et al., *Supreme Court Practice* § 4.4(e), at 248-249 (10th ed. 2013). That does not mean that any potential alternative grounds for affirmance thereby become part of the case before this Court.

If Clarke believed that the petition used the term "sovereign immunity" imprecisely, he should have said so in his brief in opposition. Sup. Ct. R. 15.2 ("[T]he brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted."). He did not do so. Instead, the question presented as stated in the brief in opposition refers only to "tribal sovereign immunity" (Br. in Opp. i), with the phrase "official immunity" appearing nowhere in that brief.

Second, official immunity was neither raised nor considered below. Clarke did not assert official immunity in the Connecticut courts, and the Connecticut Supreme Court did not mention official immunity in its decision. Clarke argues (Br. 27) that the court must have "used 'tribal sovereign immunity' as an umbrella term to encompass both sovereign immunity and offi-

cial immunity." In support of that proposition, he observes (Br. 27 n.5) that the defense of sovereign immunity and the defense of official immunity operate "the same way procedurally" because they are both presented in a motion to dismiss and are subject to interlocutory appeal. That does not mean, however, that raising one defense is sufficient to preserve the other. Clarke also suggests (Br. 13) that the decision below should be interpreted as part of a "game of telephone," noting that the Connecticut Supreme Court cited a district court decision that cited a Ninth Circuit decision that cited another Ninth Circuit decision that cited this Court's decision in *Barr* v. *Mateo*, 360 U.S. 564 (1959), which involved official immunity. "It is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance," and Clarke's strained reading of the decision below provides no basis for making an exception. *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1653 (2016).

2. No source of law supports the creation of a doctrine of tribal official immunity

According to Clarke, tribal employees should be immune from individual tort liability under state law. Clarke does not suggest that the rule he seeks already exists, still less that it has any historical basis. Instead, he urges the Court (Br. 30) to "grant tribal officials" the immunity he seeks by creating a new federal common-law rule. He does not, however, identify any source of law that would permit the creation of such a rule. As this Court has explained, federal courts "do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee* v. *Illinois*,

451 U.S. 304, 312 (1981). Instead, federal common law is limited to "'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands." *American Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 421 (2011) (quoting Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 422 (1964)). Clarke's failure to identify any constitutional or statutory basis for a federal common-law rule of tribal official immunity, combined with the uncertain historical basis for tribal sovereign immunity itself, provide substantial reason for this Court to reject Clarke's invitation.

a. Clarke does not attempt to justify tribal official immunity as an extension of tribal sovereign immunity, and with good reason. The initial source of authority for recognizing tribal sovereign immunity as a rule of federal law has been debated. See *Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 756 (1998) (noting that the doctrine "developed almost by accident"); *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2046-2049 (2014) (Thomas, J., dissenting). The first cases to address tribal immunity from suit were based on the statutory limits of federal jurisdiction. See, *e.g.*, *Thebo* v. *Choctaw Tribe of Indians*, 66 F. 372, 375 (8th Cir. 1895). Over time, the doctrine developed into the modern concept of tribal sovereign immunity. See *United States* v. *United States Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940) (citing *Thebo* for the proposition that "Indian Nations are exempt from suit without Congressional authorization"). In *Bay Mills*, this Court invoked *stare decisis* to justify continued adherence to the doctrine, and it also reasoned

that tribal sovereign immunity reflects tribes' retention of "their historic sovereign authority," which includes "the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Id.* at 2030 (quoting *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978)). Today, that immunity "is a matter of federal law." *Id.* at 2031 (quoting *Kiowa*, 523 U.S. at 756).

Official immunity, however, is not "inherent in the nature of sovereignty." *Bay Mills*, 134 S. Ct. at 2030 (quoting The Federalist No. 81, at 511 (Alexander Hamilton) (B. Wright ed. 1961)). Rather, it is the product of common law and statutes specific to the federal government. The "inherent" sovereignty of tribes, which this Court has cited as a basis for recognizing a federal rule of tribal sovereign immunity, therefore does not support recognizing a federal rule of tribal official immunity.

b. Clarke's primary argument is that tribal official immunity can be justified on the same basis as federal official immunity. Br. 29; see Gov't Br. 26. As noted in the opening brief (at 22 n.2), however, federal official immunity rests on the supremacy of federal law over that of the States. Clarke disagrees, arguing that federal official immunity "derives from the interest in 'promot[ing] the effective functioning of the Federal Government.'" Br. 30 (quoting *Howard* v. *Lyons*, 360 U.S. 593, 597 (1959)) (brackets in original). That response begs the question. The reason that State law must yield when it interferes with the functioning of the federal government is that the Supremacy Clause says it must. See U.S. Const. Art. VI, Cl. 2. The Constitution does not support a similar displacement of

state law when it comes into conflict with a tribal government.

This Court has explained that "[t]he immunity of federal executive officials began as a means of protecting them in the execution of their federal statutory duties from criminal or civil actions based on state law." *Butz* v. *Economou*, 438 U.S. 478, 489 (1978). As the Court has held, unless Congress has provided otherwise, "the activities of the Federal Government are free from regulation by any state." *Mayo* v. *United States*, 319 U.S. 441, 445 (1943); see *Arizona* v. *California*, 283 U.S. 423, 451 (1931); *Johnson* v. *Maryland*, 254 U.S. 51, 57 (1920). That is because "the constitution and the laws made in pursuance thereof are supreme; * * * they control the constitution and laws of the respective States, and cannot be controlled by them." *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819); see *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1879) (noting that the federal government "can act only through its officers and agents, and they must act within the States," so that "if their protection must be left to the action of the State court," then "the operations of the general government may at any time be arrested at the will of one of its members"); *In re Neagle*, 135 U.S. 1, 75-76 (1890). Consistent with those principles, the government argued in *Westfall* that federal official immunity was "supported by the well-settled principle that, absent a congressional determination to the contrary, federal activities must be governed by federal standards, not state law." Gov't Br. at 28, *Westfall*, *supra* (No. 86-714).

The Constitution does not make tribal law supreme over state law. Accordingly, the principles that have

supported the recognition of federal official immunity do not support the creation of a similar immunity for tribal officials.

c. Clarke alludes to two other bases for creating a rule of tribal official immunity, but neither is persuasive. First, he notes (Br. 29) that certain officials enjoy absolute immunity or qualified immunity "from civil liability for violations of federal law." But when federal law creates a cause of action, federal law can provide immunity. Creating immunity from state-law liability is different, and it requires some other constitutional or statutory justification. Second, he identifies (Br. 30) a federal statute that recognizes an interest in "strong tribal governments." 25 U.S.C. 4301(a)(6). The cited provision is part of the Native American Business Development, Trade Promotion, and Tourism Act of 2000, Pub. L. No. 106-464, 114 Stat. 2012, which created an Office of Native American Business Development within the Department of Commerce and directed it to promote tribal exports and tourism. Nothing in that statute pertains to litigation against tribal employees or suggests that Congress contemplated judicial creation of a rule of tribal official immunity.

3. Tribal official immunity should be no broader than the federal official immunity recognized in *Westfall*

To the extent a common-law rule of tribal official immunity is somehow justified, it should not exceed the federal official immunity applied in *Westfall*. See Gov't Br. 26-32. Under that standard, an official is immune from suit when "the challenged conduct is

within the outer perimeter of an official's duties and is discretionary in nature." *Westfall*, 484 U.S. at 300.

Clarke argues (Br. 30) that "*Westfall* was an outlier" that misstated the common law and has since been "repudiated." Clarke's account of the history of federal official immunity is inaccurate. The Court's decision in *Barr*—which Clarke takes to be a correct statement of the common law from which *Westfall* was a misguided departure—did not announce a categorical rule of immunity for all federal employees in all circumstances. To the contrary, Justice Harlan's plurality opinion repeatedly emphasized the discretionary nature of the conduct at issue in that case. *Barr*, 360 U.S. at 574-575. As the Court noted in *Westfall*, "*Barr* did not purport to depart from the widely followed common-law rule that only discretionary functions are immune from liability." 484 U.S. at 298 n.4. The unanimous decision in *Westfall* therefore did not "change" (Br. 34) the law as it was set out in *Barr* or as it had been applied by many lower courts. Rather, *Westfall* resolved a circuit conflict that had arisen because several courts of appeals had already held that federal official immunity is limited to discretionary conduct. 484 U.S. at 295 n.2.

Clarke also struggles to account for the series of pre-*Westfall* statutes that Congress enacted to provide immunity to particular categories of federal employees. See Pet. Br. 15-16; Gov't Br. 24-25. The most prominent of those statutes is the Federal Drivers Act, which would have been superfluous under Clarke's view of the law. Act of Sept. 21, 1961, Pub. L. No. 87-258, 75 Stat. 539. Clarke speculates (Br. 34) that because the statute was passed "shortly after"

Barr—in reality, two years later—Congress might not have been "aware of the case." But courts "assume that Congress is aware of existing law when it passes legislation," and the more plausible explanation of why the legislative history does not discuss *Barr* is that Congress correctly recognized that *Barr* did not establish the broad rule that Clarke believes it did. *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990). As for the later statutes, Clarke suggests (Br. 34) that they represented efforts "to *correct* the errors of outlier courts," but that theory is belied by the legislative history. See, *e.g.*, S. Rep. No. 1264, 94th Cong., 2d Sess. 3 (1976) ("Defense medical personnel have *long been subject* to personal liability for actions arising out of their official medical duties.") (emphasis added).

Clarke emphasizes (Br. 37-38) that after *Westfall* was decided, Congress enacted a statute creating a broader official immunity for federal employees. Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563. That statute does not mean that this Court was wrong about what the common law provided, only that Congress wished to adopt a different rule. Significantly, the Westfall Act does not cover tribal employees, and it was enacted against the backdrop of the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, which provides a waiver of federal sovereign immunity from tort claims, a waiver that many tribes have not enacted. It would hardly "respect[] the dialogue between the branches" (Br. 38) to wrench the statute from its context and apply it to a situation not covered by its text and never contemplated by Congress.

Clarke urges this Court to "pay close attention to the policy judgments embodied in the Westfall Act" (Br. 39), but all of those policy judgments pertained to *federal* employees. He argues (Br. 42) that tribal employees need immunity more than federal employees do because tribes "are heavily reliant on outward-facing commercial activities." But this case demonstrates that employees engaged in commercial activities are poor candidates for a broad immunity rule. When a tribe is conducting traditional governmental functions, the application of state law to its activities may in some circumstances "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973)). Federal laws and policies may therefore preempt some applications of state laws to such activities. See *Mescalero Apache Tribe*, *supra*; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980). But when a tribe is engaged in off-reservation commercial activity such as transporting patrons to and from a casino, application of nondiscriminatory state tort law will in no way interfere with tribal self-government. Nor will it prevent the tribe from attracting "the brightest and best" employees, who would be equally subject to state tort law if they were to work for the tribe's private-sector competitors. Br. 42 (citation omitted). Likewise, the need to ensure "fearless, vigorous, and effective administration"—an important consideration in the context of policymaking or law-enforcement officials—has little relevance to

the employees of a commercial enterprise. *Barr*, 360 U.S. at 571 (opinion of Harlan, J.).

4. Clarke's conduct did not involve the exercise of discretion

Clarke argues (Br. 49 n.7) that "driving may in some circumstances entail meaningful discretion," and that he would therefore be entitled to immunity even under *Westfall*. In fact, negligent driving is a classic example of a nondiscretionary activity. See *United States* v. *Gaubert*, 499 U.S. 315, 325 n.7 (1991); *Dalehite* v. *United States*, 346 U.S. 15, 28 (1953). Even the case on which Clarke relies acknowledged that "ordinary driving in routine traffic" does not involve meaningful discretion. *McBride* v. *Bennett*, 764 S.E.2d 44, 47 (Va. 2014) (quoting *Friday-Spivey* v. *Collier*, 601 S.E.2d 591, 595 (Va. 2004)). If the Court announces a *Westfall*-like rule of tribal official immunity, it should therefore hold that immunity does not apply to this case.

C. Applying any form of immunity in this case would be unfair and anomalous

This Court has already questioned the appropriateness of applying tribal sovereign immunity when doing so would foreclose the ability of "a tort victim, or other plaintiff who has not chosen to deal with a tribe * * * to obtain relief for off-reservation commercial conduct." *Bay Mills*, 134 S. Ct. at 2036 n.8. The Court should not erect a barrier to such relief by extending tribal sovereign immunity or creating a novel rule of official immunity for tribal employees.

1. This Court has recognized that a State retains the authority to "enforce its law on its own lands."

Bay Mills, 134 S. Ct. at 2035. Clarke argues (Br. 52) that "[t]he immunity of Tribes or tribal officials from state-law tort suits is * * * distinct from the scope of Connecticut's regulatory power," which leaves unanswered the question how, in practice, a State can meaningfully enforce its law when neither tribal employees nor a tribe itself can be sued for the off-reservation torts that they commit. Clarke does at least acknowledge (Br. 52-53) that a tribal employee is subject to state criminal law, but that concession highlights the oddity of an immunity from civil liability. It makes little sense to say that misbehaving tribal employees may be sent to prison but may not be made to compensate their victims.

Clarke responds (Br. 54-57) that victims may be compensated; they simply need to seek redress from the Tribe in tribal court. He emphasizes (Br. 53) that the compact between Connecticut and the Tribe provides for compensating casino patrons who are injured. That compact provision protects patrons who are injured on the reservation and who might lack a state-court tort remedy. It does not address plaintiffs like the Lewises, who never visited the Mohegan reservation and had no contact with the Tribe until they became the unwitting victims of Clarke's negligence.

Even though the Mohegan Tribe would allow a tribal-court action in these circumstances, many tribes would not. Pet. Br. 28. It is therefore certain, not just "theoretically possible" (Br. 47), that Clarke's rule will leave some victims uncompensated. And Clarke's claim (Br. 50) that that immunity is necessary in order to protect tribes from "crippling liability" suggests that he agrees that immunity will result in the under-

compensation of victims—indeed, he welcomes the prospect.

2. Clarke argues (Br. 45) that an employee of any other sovereign would be absolutely immune in these circumstances. That is incorrect, and it obscures what is truly anomalous about the rule Clarke advocates. Because the Tribe has refused to waive its sovereign immunity except in its own courts, Clarke's rule would mean that the victims of off-reservation torts committed by tribal employees would be unable to seek relief in the courts of the place where the accident occurred. Instead, they would have to seek redress in the courts of a different sovereign. No other sovereign enjoys that kind of immunity.

Foreign officials. Clarke attempts (Br. 44-45) to analogize himself to an employee of a foreign government. But foreign-government drivers have not traditionally been immune from individual-capacity negligence actions. See *Restatement (Second) of the Foreign Relations Law of the United States* § 66 cmt. b, at 201-202 (1965); *Rishikof* v. *Mortada*, 70 F. Supp. 3d 8, 15 (D.D.C. 2014). In any event, if Clarke were employed by a foreign government, the Lewises could sue his government in an American court. See 28 U.S.C. 1605(a)(2) (commercial-activity exception to Foreign Sovereign Immunities Act); see also 28 U.S.C. 1605(a)(5) (domestic-tort exception). They would not need to seek relief in a foreign forum.

Employees of the United States or Connecticut. If Clarke were employed by the federal government, an action against him would be converted into an action against the United States, and the Lewises could pursue that action in the District of Connecticut. 28

U.S.C. 2679(d). Similarly, if he were employed by the State of Connecticut, they could sue the State in Connecticut state court. Conn. Gen. Stat. § 4-141 *et seq.* In neither case would they need to bring an action in the courts of a different sovereign.[1]

Employees of another State. Clarke contends (Br. 45) that he would be absolutely immune from suit in Connecticut if he were an employee of another State. That is incorrect.

This Court has held that a state court is not bound to respect the sovereign immunity of another State. *Franchise Tax Bd.* v. *Hyatt*, 538 U.S. 488, 497 (2003) ("[T]he Constitution does not confer sovereign immunity on States in the courts of sister States."); *Nevada* v. *Hall*, 440 U.S. 410 (1979). But the Court has also held that the Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, prohibits a state court from applying a "special rule" that treats another State worse than the forum State would treat itself. *Franchise Tax Bd.* v. *Hyatt*, 136 S. Ct. 1277, 1282 (2016) (*Franchise Tax Board II*). A state court may not, for example, permit the recovery of damages against an agency of another State in an amount greater than it would permit against its own agencies. *Ibid.*

This Court has not considered whether the principles articulated in *Franchise Tax Board II* apply to

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[1] Clarke asserts (Br. 55) that "some States * * * preclude recovery against both the State and its officials." The only example he offers is that of Alabama, but the Alabama Supreme Court has held that a state-employed driver is *not* immune from negligence liability. *Ex parte Cranman*, 792 So. 2d 392, 404 (Ala. 2000). So far as we are aware, every State would permit recovery against either its employee or the State itself in these circumstances.

individual-capacity actions against state employees, as opposed to actions against a State itself. Assuming *arguendo* that they do, then if Clarke were an employee of a State other than Connecticut, the Connecticut state court would be compelled to treat him no less favorably than it would treat a Connecticut employee. Here, that means that a Connecticut court would grant Clarke immunity *and* would permit an action against the State that employed him.

The Tribe, however, has made such a resolution impossible by refusing to waive its immunity except in its own courts. In effect, Clarke and the Tribe wish to take advantage of the rule of *Franchise Tax Board II* while avoiding the rule of *Hall*, thus ensuring that neither the Tribe nor its employees can be subject to suit in Connecticut. Instead, Clarke's position is that a state-law negligence action against a driver personally, based on conduct occurring entirely within Connecticut, may be brought only in the courts of the Tribe—a jurisdiction with which the Lewises have had no voluntary contact—where tribal law would define the standards of negligence and the limits on liability. That is an unprecedented expansion of tribal adjudicatory jurisdiction and a corresponding usurpation of Connecticut's right to enforce its own public policy of providing safe highways for those in Connecticut. See *Franchise Tax Board II*, 136 S. Ct. at 1281 (The Full Faith and Credit Clause "does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy.") (quoting *Carroll* v. *Lanza*, 349 U.S. 408, 412 (1955)). The resulting immunity from suit in Connecticut courts is in

no way comparable to what any other State would enjoy.[2]

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For the foregoing reasons and those stated in the opening brief, the judgment of the Connecticut Supreme Court should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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[2] *Amici* National Congress of American Indians et al. suggest (at 8-24) that the decision below may be construed to rest on a state-law theory of comity. But where, as here, "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," then this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983).